SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, *et al.*,

Appellants,

v.

STATE BOARD OF ELECTIONS, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the Eastern District of Virginia entered on May 2, 1967, denying their prayers for injunctive relief and a declaratory judgment and dismissing the case, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the District Court for the Eastern District of Virginia is reported at 268 F. Supp. 218. Copies of the Opinion and Judgment of the District Court are attached hereto, Appendix pp. 1a to 9a.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343, 2201 to enforce rights protected by the equal protection clause of the Fourteenth Amendent and the Voting Rights Act of 1965 (42 U.S.C. §§1973, *et seq.*). The complaint sought to restrain the Virginia State Board of Elections and other election officials from enforcing a state statute, Va. Code §24-252, insofar as it authorized the officials not to count write-in votes unless they were inserted on the ballot in the voters' own handwriting. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284 (R. 20).

A final judgment of the court below denying injunctive relief and dismissing the case was entered May 2, 1967 (R. 90). Timely notice of appeal to this Court was filed in the court below on June 29, 1967 (28 U.S.C. §2101(b)) (R. 91). The District Court, by order dated August 24, 1967, extended the time for docketing the appeal in this Court to September 28, 1967 (R. 96).

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253. This Court's jurisdiction is sustained by *Harman* v. *Forssenius*, 380 U.S. 528, 532-533; see also, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Query* v. *United States*, 316 U.S. 486; *Stratton* v. *St. Louis-Southwestern Ry. Co.*, 282 U.S. 10.

Constitutional and Statutory Provisions Involved

1. This case involves the validity of Code of Virginia, 1950, §24-252 (Code of Va. 1964 Repl. Vol. 5, p. 271), which provides as follows:

> §24-252. *Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person. (Code 1919, §162; 1936, p. 278; 1952, c. 581; 1962, c. 536.)

2. The following additional provisions are material to an understanding of the issues presented.

(a) Code of Virginia, §24-251:

> §24-251. *Judges or others to assist certain voters.*—Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so

designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months. (Code 1919, §166; 1946, p. 316; 1950, p. 230.)

(b) Constitution of Virginia, §§27, 28:

"§27. *Method of Voting.*—All elections by the people shall be by ballot; * * *

"The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.

So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."

"§28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

(c) Constitution of the United States, Art. I, Section 4, Clause 1:

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Repre-

sentatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(d) Title 2, U.S.C., §9:

§9. *Voting for Representatives.*—All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect. (R. S. §27; Feb. 14, 1899, c. 154, 30 Stat. 836.)

(e) Title 42, U.S.C., §1973b(a), (b), (c):

§1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under snbsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the

five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(f) Title 42, U.S.C., §1973c:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in sec-

tion 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89-110, §5, Aug. 6, 1965, 79 Stat. 439.

(g) Title 42, U.S.C., 1973*l*(c)(1):

Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(h) Title 42, U.S.C., §1973i(a):

§1973i. Prohibited acts—Failure or refusal to permit casting or tabulation of vote

(a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

Questions Presented

I.

Whether the requirement of Virginia Code section 24-252, that write-in votes be in the voters' own handwriting, is in conflict with the provisions of the Voting Rights Act of 1965 forbidding denial of the right to vote for failure to comply with "tests or devices" as defined in the Act?

II.

Whether Virginia Code section 24-252 unconstitutionally discriminates against illiterates by failing to provide equal protection for the secrecy of their ballots in violation of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

This litigation involves the claim of certain illiterate registered voters, newly eligible to vote because of the provisions of the Voting Rights Act of 1965, that Virginia election law unlawfully discriminated against them. They object to the lack of any procedures for protecting the privacy and secrecy of illiterates' write-in votes from disclosure to state officials. The issues arose in the context of a general election for members of the House of Representatives which was held November 8, 1966, in Virginia's Fourth Congressional District. Rep. Watkins M. Abbitt, the incumbent, and Edward J. Silverman were the candidates listed on the ballot. The plaintiff-appellants were supporters of S. W. Tucker, a well-known civil rights attorney in Virginia who was a write-in candidate for Congress. The plaintiffs, as the court below found, were "unable to spell accurately or to write legibly" (268 F. Supp. at 219). They sought to vote for S. W. Tucker by pasting a sticker, upon which his name was printed, on the official ballot under the names of the listed candidates, and then making the appropriate marking preceding his name (R. 9-17). The defendant election officials did not count the votes for Tucker on ballots marked with the Tucker stickers. They disallowed the ballots, relying on Virginia Code section 24-252, which permits the insertion of names on general election ballots in the voter's "own

handwriting," and provides that ballots with a name placed thereon "in violation" of the section shall not be counted for such person. According to the statement published by the defendant Board of Elections, the 1966 congressional election was won by Rep. Abbitt with 45,226 votes; Mr. Silverman drew 14,827 votes, and 7,907 write-in votes were counted (R. 61, Pl's Exhibit No. 2, p. 9).

This action was commenced November 28, 1966, shortly after the election. Plaintiffs prayed in their complaint, *inter alia,* for a judgment declaring Virginia Code section 24-252 invalid and in conflict with the equal protection clause of the Fourteenth Amendment and also the Voting Rights Act of 1965, insofar as the Virginia law "purports to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; . . ." (R. 7); and prayed that the court enjoin defendants from failing and refusing to count votes inserted on official ballots "by means other than handwriting" in the November 1966 election, and such votes "hereafter given" in future elections (R. 8). By their subsequent motion for summary judgment, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (R. 69).

A statutory three-judge district court was convened to hear and determine the case (R. 20-21). The plaintiffs submitted requests for admissions under Rule 36 (R. 38-47), none of which were denied under oath by the defendants (R. 49-56). The defendant State Board of Elections had the statutory duty to supervise and coordinate the work of county and city electoral boards to obtain uniformity in their practices and proceedings and to make rules and regulations for their functioning. (Code of

Virginia, 1950, §24-25.) The other defendants were judges of election and clerks of election in precincts in which the plaintiffs resided. The requests for admissions developed the facts with respect to the use of Tucker stickers by illiterate voters in several areas where paper ballots were used, and that such votes were not counted. The court below treated the facts as undisputed (268 F. Supp. at 219).

By way of defense, the State Board of Elections offered in evidence several letters or bulletins which it had distributed to local voting officials during the summer of 1965 after the passage of the Voting Rights Act. One letter to all voting registrars advised that Virginia's prior registration procedures could no longer be used, and that if applicants were unable to complete registration forms the registrar should orally examine the applicant and assist him in completing the registration forms (R. 65). The Voting Rights Act provisions which prompted the above-mentioned letter were those which temporarily forbade the use of literacy tests or devices in states to which the Act was made applicable. (42 U.S.C. §1973b.) And, of course, the Voting Rights Act, designed to end racial discrimination in voting, was applicable in Virginia.[1]

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[1] The designation of Virginia under §1973b(b) was published in the Federal Register on August 7, 1965, 30 Fed. Reg. 9897. In describing the history which led to passage of the Act this Court said in *South Carolina v. Katzenbach*, 383 U.S. 301, 310-311:

> Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. (Footnotes omitted.)

The State Board of Elections also introduced a bulletin to election judges dated October 15, 1965 (R. 68). The bulletin was supplied to voting registrars and secretaries of electoral boards for them to distribute to judges of elections (R. 66-67). The bulletin stated:

BULLETIN FROM STATE BOARD OF ELECTIONS

TO ALL JUDGES OF ELECTION:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

These instructions also apply to precincts in which voting machines are used.

There was no evidence in the record indicating to what extent, if any, the public was advised of the rule and policy set forth in the bulletin to election judges. Neither is there anything in the record indicating whether or not any instructions similar to those stated in the 1965 bulletin were reissued at the time of the 1966 congressional election or whether voters had any way of knowing that election

judges were instructed to assist illiterates in completing their ballots. The court below merely found that "The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state." (268 F. Supp. at 221.)

The district court denied the relief prayed and dismissed the case. The court rejected appellants' claim of unconstitutional discrimination against illiterates, citing the decision in *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, for the proposition that discrimination between illiterate and literate voters does not violate the Fourteenth Amendment. (268 F. Supp. at 220.) The court also rejected appellants' argument that Virginia Code section 24-252 was rendered invalid by the Voting Rights Act of 1965. The court held that the Virginia requirement that the write-in candidate's name be inserted in the voter's own handwriting was "not a test or device defined in 42 U.S.C. §1973b(c)." (268 F. Supp. at 221.) The court said that the requirement did not prevent the appellants from registering and voting, and that the Board of Elections' bulletin provided for them to be assisted by election judges in casting ballots.

The Questions Are Substantial

Introduction

At stake in this case are the claims of educationally deprived voters, who cannot spell accurately or write legibly, that they have the same right to vote for the candidates of their choice, to have their votes counted, and to protect the secrecy of their ballots from state election judges as do other voters.

The questions presented are of public importance from several points of view. First, of course, the right to vote and have one's vote counted is at stake. The Court has long recognized the constitutional protection for such rights. (*Ex parte Yarbrough,* 110 U.S. 651; *United States* v. *Mosely,* 238 U.S. 383), and has on innumerable occasions stated the importance of protecting the right to vote. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, calling the right to vote important "because preservative of all rights." And see *Reynolds* v. *Sims,* 377 U.S. 533, 555; *Harman* v. *Forssenius,* 380 U.S. 528.

Second, the case involves the rights of numerous persons newly enfranchised by the Voting Rights Act of 1965, who had long been disenfranchised by a host of discriminatory measures in Virginia and other states,[2] and presents serious questions regarding the interpretation and application of that important federal law. It is appropriate that this Court give guidance by construing the law.

Third, the case involves the secrecy of the ballot. The Court has not, to our knowledge, had a previous occasion to deal with threats to the secrecy of the ballot, but it has,

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[2] See, e.g., *Harman* v. *Forssenius,* 380 U.S. 528; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 310-311 (quoted *supra,* note 1).

of course, dealt with the kindred question of the right to anonymity in political expression, *Talley* v. *California,* 362 U.S. 60; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, and has agreed to hear a case this term involving attempted suppression of anonymous election literature. *Zwickler* v. *Koota,* No. 29, Oct. Term 1967. The right of a secret ballot is of considerable practical moment for political dissidents, such as appellants, who were supporters of a write-in candidate opposing an incumbent who had served ten consecutive terms.[3] In such circumstances the right to keep one's vote secret from a state election judge belonging to the dominant political group is of more than abstract importance. Virginia election judges are appointed by local electoral boards under a statute which directs that representation be given to the two leading political parties in the last election, Va. Code §24-30.

This controversy arises from the fact that Virginia, having been required to permit illiterates to vote by the Voting Rights Act of 1965 because the state permitted only white illiterates to vote in the past, failed to provide a method to protect the secrecy of illiterates' votes from state officials, and disallowed the votes of appellant who sought to vote secretly for a write-in candidate by inserting paper stickers bearing the candidate's name, on their ballots. By way of introduction to the issue presented, we point out several undisputed matters. First, it is agreed that in accordance with the Voting Rights Act of 1965 appellants are entitled to vote in their respective counties, notwithstanding their illiteracy. Until 1965 Virginia excluded illiterates from voting; the state Constitution and statutes required that applicants for voting registration, except those physically

[3] The Hon. Watkins Abbitt, Representative from Virginia's Fourth Congressional District has served in office since the 80th Congress.

unable, must apply in their "own handwriting."[4] But those provisions were suspended by the federal Voting Rights Act of 1965 which became applicable in Virginia August 7, 1965. 42 U.S.C. §1973b(a); 30 Fed. Reg. 9897. Second, the facts are not in dispute, and it was found by the court below that appellants were unable to write, that they did insert votes for a write-in candidate, S. W. Tucker, by using gummed stickers or labels bearing his name, and that their votes were not tabulated or counted for Tucker. Third, the background of Virginia law relevant to the case includes (1) a state constitutional provision that elections "shall be by ballot" and that "the absolute secrecy of the ballot shall be maintained" (Const. of Va., §27); and (2) a state constitutional provision permitting write-in votes (Const. of Va., §28).

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[4] Constitution of Virginia, section 20, provides in part, as follows:

> § 20. *Who may register.*—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:
>
> • • • • •
>
> Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and, • • •"

The provision was implemented by statutes. Virginia Code of 1950, sections 24-68, 24-71.

I

The Handwriting Requirement Of Virginia Code Section 24-252 Was Suspended By The Voting Rights Act Of 1965.

It is appellants' submission that the Virginia Statute which authorized the election officials not to count their ballots (Code section 24-252) was suspended on August 7, 1965 when Virginia was brought under the coverage of the Voting Rights Act of 1965. They seek an injunction and a declaratory judgment holding that statute invalid and restraining its enforcement on this statutory ground as well as on the constitutional grounds argued in Part II, *infra*. Appellants' constitutional argument involves the secrecy of the ballot. The Voting Rights Act argument does not turn on the secrecy issue but does strike at the state law which was used to invalidate appellants' ballots and thus supports their right to vote effectively and in secret.

Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a) (quoted *supra* pp. 5-6) provides that "no citizen shall be denied the right to vote . . . because of his failure to comply with any test or device." Section 4(c) of the Act, 42 U.S.C. §1973b(c) (*supra* p. 7), defines the phrase "test or device" to mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject. . . ." Section 14(c)(1) of the act, 42 U.S.C. §1973*l*(c)(1) (quoted at p. 9 above), defines the terms "vote" and "voting" to "include *all action necessary to make a vote effective . . . including,* but not limited to registration, listing pursuant to this Act, or other action required by law prerequisite to

voting, casting a ballot, and *having such ballot counted properly and included in the appropriate totals of votes cast . . .*" (emphasis added). Finally, section 11(a) of the Act, 42 U.S.C. §1973i(a) (quoted above, p. 9), prohibits a refusal to count the vote of anyone who is entitled to vote under the Act.

The court below held that the requirement of Va. Code section 24-252, that write-in votes be inserted in the voters "own handwriting," was not a "test or device" within the meaning of section 4 of the Voting Rights Act. The court seemed to rest its conclusion on the assertion that "[t]he requirement of [Va. Code §24-252] did not preclude the plaintiffs from registering or from voting" (268 F. Supp. at 221-222). This answer, we submit, is plainly insufficient. The appellants were precluded from voting, if "voting" is defined as in the Voting Rights Act and in normal usage to mean casting an effective ballot and having it counted. As indicated above, section 14(c)(1) of the Voting Rights Act of 1965 includes everything necessary to have a vote counted within the term "voting." Moreover, this usage is consistent with that in decisions of this Court over a long period of years. See *United States* v. *Mosely*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299, 315.

The opinion below seeks, in part, to avoid the thrust of appellants' argument that the handwriting requirement is a "test or device" under Section 4 of the Voting Rights Act by pointing to the fact that on October 15, 1965 the Board of Elections ordered election judges to aid illiterates. But this argument is not responsive to the question whether Section 24-252 was suspended as a matter of law on August 7, 1965 several months before the election board's reaction. If Section 24-252 was suspended, no basis for disallowing appellants' votes remains and they are entitled to an order enjoining its enforcement. There is no ground for conclud-

ing that Section 24-252 was only partially suspended, so as to save the last sentence which allows votes not to be counted.

The Court below did not discuss another question which was necessarily raised by its view of the October 15th bulletin as a sort of amendment of Virginia's voting laws. If this bulletin in effect replaced a suspended statute then the procedure set forth in the bulletin was also suspended automatically by another provision of the Voting Rights Act of 1965, e.g. Section 5. That provision suspends all new voting regulations in states covered by the Act pending review by federal authorities to determine whether their use would be racially discriminatory. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335. The new Virginia procedure comes within Section 5 which refers to a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964" (42 U.S.C. §1973c). There is no allegation by the State that the October 15th bulletin was approved by the United States District Court for the District of Columbia, or was submitted to the Attorney General without objection as provided in Section 5 of the Voting Rights Act. Thus, in accord with Section 5 "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure."

Two additional comments should be made about the Board of Election's new procedure set forth in the October 15, 1965 bulletin. At first blush it seems to be an attempt to conform to and obey the Voting Rights Act, but this record shows that in practice it conditions the rights of illiterates to vote upon their willingness to divulge their votes to state election judges. The constitutionality of that condition is explored further in argument II below. Second, we submit that the reasonableness of the procedures must be

appraised from the standpoint of the illiterate voters. There is not any showing in this record that they had any way of even knowing about the new procedures set up in the election board's internal bulletin.

Application of the Voting Rights Act to suspend the handwriting requirement of Va. Code section 24-252, is fully in accord with the Congressional purpose, and should be adopted to support the policy of the Act. We urge four separate considerations which support the desirability of a ruling that Section 24-252 was suspended.

First, an interpretation of the Act to permit the handwriting requirement to continue in effect creates a plainly anomalous result, considering that it is conceded that the handwriting requirements for voter *registration* (contained in Virginia Constitution section 20, and in Virginia Code section 24-68) are suspended by the Voting Rights Act. The handwriting requirement of Code section 24-252, is not materially different from that in the other provisions and should also be suspended. Nothing in the Voting Rights Act supports the result of suspending two of the handwriting requirement laws and not suspending the third.

Second, this controversy involves the "manner of holding elections for Senators and Representatives," a matter which under the Constitution of the United States (Article I, section 4, clause 1) is committed to the ultimate control of the Congress. Congress is fully authorized under the Constitution to "make or alter" rules regarding the manner of conducting a federal election. A federal law intended to be protective of the right to vote in federal elections should be liberally construed as against a state enactment which narrowly and technically restricts the right to cast effective votes. As the whole area of federal election mechanics is committed to Congressional control there is no problem of infringement of States' rights underlying the controversy.

Third, the policy against rules which thwart the right to vote on the basis of the technicalities of state law has been stated very plainly by the Congress. The provisions of 42 U.S.C. §1971(a)(2)(B), forbid the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election." [5] There is no justification, in terms of administrative convenience, for disallowing ballots on such an overly technical ground as that used by appellees. As the Court said a few terms ago in another context involving a threat to the right to vote in *Carrington* v. *Rash*, 380 U.S. 89, 96:

> We deal here with matters close to the core of our constitutional system. "The right . . . . to choose," United States v. Classic, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. Oyama v. California, 332 U.S. 633.

Fourth, the appellants' use of stickers to indicate their votes was entirely reasonable under the circumstances and the States' invalidation of their ballots was unreasonable. The Voting Rights Act should be construed to block unreasonable measures which disfranchise voters where it may be reasonably construed to accomplish this end. The appellants were presented with a dilemma in the 1966 election; they face the same problem in future contests. They desired to vote write-in ballots for S. W. Tucker.

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[5] The right to "vote," in this statute also, includes "all action necessary to make a vote effective," including having the ballot "counted and included in the appropriate totals of votes cast." See 42 U.S.C. § 1971(a)(3)(A), incorporating the definition in 42 U.S.C. § 1971(e).

They also desired to keep their ballots secret. Virginia law, on the face of the statute books, still absolutely forbade them to vote except in their own handwriting. The statutes themselves made no exception for illiterates to be aided even by election judges. An Election Board bulletin directed election judges to aid them on request. But the Election Board had no power to enact any criminal law which might be a deterrent to a voting judge breaching a voter's confidence, and did not purport to do so. Thus, illiterates were not offered even the limited protections which were offered to handicapped and blind voters by Virginia Code section 24-251.[6] Voters who could not read had the problem, which physically handicapped voters did not have, of not having any available means of knowing whether or not the election judge was faithfully carrying out their directions. Blind voters were offered the option of being assisted by a trusted friend; appellants were not given this choice. Voters with physical handicaps other than blindness could at least observe and comprehend the actions of the election judges who cast their votes. Only illiterate voters were placed entirely at the mercy of election judges who were not even bound by any statute of the state to follow their instructions or keep their confidence. It is no sufficient answer here to say that it is presumed that the election

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[6] The existence of such criminal sanctions was thought by a Virginia court to be essential to the validity of a similar 19th century Virginia law which was challenged because of the threat to the secret ballot. *Pearson* v. *Board of Supervisors of Brunswick County*, 91 Va. 334, 21 S.E. 483 (1895). In *Pearson*, the Court sustained an 1894 Virginia law which included a provision that at the request of an elector physically or educationally unable to vote a special constable could aid him in preparing his ballot. The law was attacked as an infringement of the secret ballot. The Court acknowledged "that very great power is placed in the hands of this special constable, that a great trust is reported in him, and that wherever confidence is given it is liable to be abused" (*Pearson, supra*, 21 S.E. at 485). But, the Court sustained the law relying on the fact that the constables were "under the sanction of an oath" and were subject to "severe penalties" for violating their duties.

judges will function honestly and do their duties. The Voting Rights Act of 1965 was necessary precisely because all other efforts to halt racial discrimination *by voting officials* had failed. The Virginia statutes give election officials no directions and prescribe no duties for them with respect to aiding illiterates. Laws and procedures which gave state officials total discretion were a principal means of preventing Negroes from voting. *Louisiana* v. *United States*, 380 U.S. 145, 152-153. After the Voting Rights Act of 1965 was enacted, the United States found it necessary in some communities for federal observers to watch state officials while they assist illiterates in voting. See *United States* v. *Executive Com. of Dem. P. of Greene Co., Ala.*, 254 F. Supp. 543 (N.D. and S.D. Ala. 1966).

Appellants chose a reasonable method of solving their problem by using stickers to indicate their votes. As the court below acknowledged in its opinion, this is a method approved in a number of state courts (268 F. Supp. at 220). Of course, the state might prescribe some method other than the use of stickers, or permitting voters to be assisted by persons they choose, that would afford protection for the secrecy of the ballots of persons unable to write legibly. The complaint here is simply that Virgina has not furnished any such method. The Voting Rights Act should be construed so as to aid appellants in voting effectively and secretly. A finding that the Virginia handwriting requirement is suspended provides that protection for appellants.

As appellants made clear in the court below, they seek relief to protect their votes in future elections (R. 7-8, 69, 73). The future application of the Virginia rule will have a chilling effect on political participation by all illiterate persons who oppose the dominant political organization in an area. Illiterates who support unpopular candidates are the ones who will feel the pinch of Virginia's law. It will

take no great courage for an illiterate to seek help from an election judge when he wishes to vote for the State's dominant political forces. It may be another matter entirely when the illiterate supporter of a dissident minority candidate arrives at the polls in some areas of the Fourth Congressional District such as Prince Edward County Virginia. Cf. *Griffin* v. *School Board,* 377 U.S. 218.

Thus, for all these reasons, in addition to the plain language of the statute, the Voting Rights Act of 1965 should be construed to invalidate Virginia's statute permitting write-in ballots, to be discounted unless they are in "handwriting."

II

Virginia Code Section 24-252 Does Not Afford Appellants, Who Are Unable To Spell Accurately And Write Legibly, Equal Protection For The Secrecy Of Their Ballots.

Appellants seek protection for the secrecy of their ballots in federal elections. They object to a Virginia statute, which has been applied to deny them the opportunity to vote effectively for write-in candidates unless they are willing to disclose their votes to state election judges. They urge that the State denies them equal protection by failing to afford them any of the number of available procedures by which they might receive the same protections for the secrecy of their ballots which Virginia gives to voters who are able to write legibly and spell accurately. Indeed, they are not even given the protection available for blind voters, e.g., the right to be aided by someone other than an election judge if they choose.

As we have pointed out earlier, Virginia's Constitution protects the secrecy of the ballot (Constitution of Virginia,

section 27), and for literate voters there is, in the words of the Constitution, "absolute secrecy." The right to a secret ballot also finds support in relevant federal law. Congress enacted the law now codified as 2 U.S.C. §9 nearly 100 years ago. This section (quoted *supra* at p. 5) requiring that all votes in congressional elections be "by written or printed ballot" has been construed to require a *secret* ballot. See *Johnson* v. *Clark*, 25 F. Supp. 285 (N.D. Tex. 1938); cf. *Voorhes* v. *Dempsey*, 231 F. Supp. 975 (D. Conn. 1964).

It seems rather clear that when the Congress enacted 2 U.S.C. §9, in 1871, it intended to provide a secret ballot as opposed to the *viva voce* method of voting. During the debates on the Act (the provision was originally section 19 of the Act of February 28, 1871, 16 Stat. 440, c. 99, §19) Congressman Bingham said: "What objection can there be to the ballot? . . . It occurs to me that there is but a single State in the Union to-day that tolerates the old method of voting viva voce." Cong. Globe, 41st Cong., 3d Sess. 1284 (1871). Secrecy was clearly a part of the contemporary 19th Century understanding of the word ballot as evidenced by judicial usage. For example, as the Court stated in *In re Massey*, 45 F. 629, 634-635 (E.D. Ark. 1890):

> That the word "ballot" implies secrecy is unquestioned, and, if it was provided that the election shall be by ballot, and nothing further was said, then it would be without doubt the right of the elector to have the secrecy of the ballot preserved from impertinent or improper inspection . . .

The objective of the 41st Congress was to introduce the authority of the federal government into the fight to secure and preserve the integrity of federal elections. It could not but have concurred in the conclusion which had

been reached by the majority of State legislatures that secrecy, as the fundamentally distinguishable characteristic of voting by ballot, was an efficacious tool to enlist in the war against a variety of electoral evils being practiced throughout the country.[7]

Moreover, the right of a secret ballot is obviously bound up in a close relationship with the right of privacy of association for the advancement of political beliefs which is plainly protected by the Constitution. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449; *Talley* v. *California,* 362 U.S. 60; *Shelton* v. *Tucker,* 364 U.S. 479; *Bates* v. *Little Rock,* 361

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[7] The attitude of the majority of states on the efficacy of secrecy has been succinctly summarized:

"Absolute secrecy in voting reaches effectively a great number of evils, including violence, intimidation, bribery and corrupt practice, dictation by employers or organizations, the fear of ridicule and dislike or of social or commerce injury—in fact all coercive and improper influence of every sort depending on a knowledge of the voter's political action." *Taylor* v. *Bleakley,* 55 Kan. 1, 39 P. 1045 (1895).

That the 41st Congress was confronted with many of these evils emerges from the debate on 2 U.S.C. § 9:

"A few words as to its [the act's] necessity . . . we all know that Ku Klux outrages have been committed, not only in North Carolina . . . but in other states of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot box . . ." Cong. Globe, 41st Cong. 3d Sess. 1275 (1871) (Remarks of Rep. Churchill).

"Your 'repeaters,' your 'ballot-box stuffers,' your 'Ku Klux Klans,' intimidation of loyal citizens—these and numberless other agencies of wrong and fraud on the ballot, overturning the power and will of the people, will continue to run riot in the land unless prevented by some such legislation as this . . . We have seen the electors of states defrauded out of the honest expression of their choice of candidates at the ballot-box, and in others we have seen similar results from terrorism, intimidation, and violence." *Id.* at 1276 (Remarks of Rep. Lawrence).

"The object of the bill is very manifest, and in my judgment just as it is manifest. It is to prevent, under the law and by virtue of the law, any violation of the rights of the citizen by fraud or corruption on the part of any one to whom is intrusted the conduct of the election or the registration of voters." *Id.* at 1284 (Remarks of Rep. Bingham).

U.S. 516. Accordingly, any state invasion of the privacy of the ballot must be justified by some compelling showing. "Where there is a significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker, supra*, 364 U.S. at 488.

Quite plainly, the secret ballot is a valuable privilege which cannot be denied or infringed on a discriminatory basis. The Virginia discrimination against illiterates serves no overriding governmental purpose which can justify the differential treatment. It should be noted that the Virginia statutes contain no specific and direct prohibition against the use of voting stickers. The appellees found the prohibition implied from the requirement that write-in candidates' names be inserted in the voter's own handwriting, Va. Code §24-252. But the Virginia election officials are apparently quite prepared to accept the handwriting of an election judge in lieu of the voter's handwriting, just as the Virginia laws accepts the handwriting of any friend brought into the voting booth by a blind voter. The state's legislative and administrative scheme shows no consistent concern for whose handwriting appears on the ballot; only a concern that names be inserted in someone's handwriting. But there has been no showing or argument forthcoming from the State which demonstrates why the State has such a great interest in the insertion being done in handwriting as opposed to printing or some other method, or why the subscription for illiterates must be done in the handwriting of an election judge and not by some other person who is not a state official. The State has not carried the burden of

demonstrating that the handwriting requirement is so "necessary to the proper administration of its election laws" that the interest may be elevated above the constitutionally protected right of a citizen to vote and have his vote counted. *Harman* v. *Forssenius,* 380 U.S. 528, 543. The handwriting requirement is merely a remaining vestige of Virginia's long-lived system of enforcing a literacy prerequisite for voting, a system designed from its inception to prevent Negroes from voting. *Harman* v. *Forssenius, supra,* 380 U.S. at 543.

The opinion below states that illiterates have no Fourteenth Amendment right to vote and apparently concluded from this proposition that discrimination against illiterates does not violate the Fourteenth Amendment (268 F. Supp. at 220). But illiterates now have a right to register and vote in Virginia under the Voting Rights Act, which was made applicable to the State under the congressional formula designating those states where literacy tests had been used to discriminate against Negroes. An unjustifiable discrimination among those equally entitled to vote under the operative law establishing voting qualifications is nonetheless a denial of equal protection of the laws whatever might be the rule if voting qualifications were different. When the law affords a right it must be afforded on equal terms. The State should not be permitted to invade the right of a secret ballot where there are plainly available methods which can assure voters' privacy from state election officials.

CONCLUSION

It is respectfully submitted that this case presents substantial questions which justify full briefing and plenary consideration by the Court.

Respectfully submitted,

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APPENDIX

Opinion by Butzner, *D.J.*

UNITED STATES DICTRICT COURT

E. D. VIRGINIA

RICHMOND DIVISION

May 2, 1967

Civ. A. No. 5041

RICHARD ALLEN, LENA W. DUNN, WASHINGTON MOORE, MCKINLEY DUNN, NORA TYLER, JAMES GILBERT TYLER, FANNIE M. BROWN, PATRICK H. BROWN and JAMES DONIKENS,

Plaintiffs,

v.

STATE BOARD OF ELECTIONS, MARK GRIZZARD, FOREST LANKFORD, BENJAMIN GRIFFIN, ROBERT E. GARNETT, J. S. LIPSCOMB, THOMAS BROWN and PAUL BELL,

Defendants.

MEMORANDUM OF THE COURT

Before BRYAN and WINTER, *Circuit Judges,* and BUTZNER, *District Judge.*

BUTZNER, *District Judge:*

The plaintiffs, registered voters who are unable to spell accurately or to write legibly, attempted to cast their votes for a write-in candidate in the 1966 congressional election. Each pasted a sticker, upon which the write-in candidate's name was printed, on the official ballot

under the names of listed candidates and appropriately marked the ballot immediately preceding the sticker. These ballots were not tabulated for the write-in candidate. Upon these undisputed facts, the plaintiffs seek a declaratory judgment that the Fourteenth Amendment's equal protection clause and the Voting Rights Act of 1965 (42 U.S.C. § 1973 et seq.) invalidates § 24-252, Code of Virginia 1950, insofar as this section denies to any voter, solely because of his inability to write, the privilege of casting a secret ballot for a candidate whose name is not printed on the official ballot. The plaintiffs pray that the defendants be enjoined from refusing to count any vote because the candidate's name was inserted on the official ballot by means other than the voter's handwriting. We conclude that the relief sought by the plaintiffs should be denied.

Pertinent provisions of the Virginia Constitution are:

> "§ 27: *Method of Voting.*—All elections by the people shall be by ballot; • • •
>
> "The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.
>
> So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."
>
> "§ 28. *Ballots.*—The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candi-

dates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

Section 24-252, Code of Virginia 1950, provides:

> *"Insertion of names on ballots.*—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) or a line (−) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

The propriety of stickers is a matter for legislative, not judicial determination. Arguments for and against their use abound. Stickers have been lauded for facilitating voting and denounced as conducive to fraud and confusion. Their use has been approved under statutes permitting write-ins. Pace v. Hickey, 236 Ark. 792, 370 S.W. 2d 66 (1963); O'Brien v. Board of Elections Comm'rs, 257 Mass. 332, 153 N.E. 553 (1926); Dewalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771 (1892); State on Complaint of Tank v. Anderson, 191 Wis. 538, 211 N.W. 938 (1927). Illinois forbade their use, Fletcher v. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617 (1898), and the constitutionality of this ban has been upheld. Blackman v. Stone, 101 F.2d 500, 504 (7th Cir. 1939).

The plaintiffs' contention that § 24-252 violates the Fourteenth Amendment because it discriminates against

illiterates is not supported by authority. To the contrary, exclusion of illiterate persons from voting, if no other discrimination is practiced, does not violate the Fourteenth Amendment.

In Lassiter v. Northampton Election Bd., 360 U.S. 45, 51, 79 S.Ct. 985, 990, 3 L.Ed.2d 1072 (1959), the Court said:

> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record • • • are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. • • • It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. • • • North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

Lassiter warns that "* * * a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." 360 U.S. 53, 79 S.Ct. 991. No evidence has been presented that Virginia's prohibition of stickers had been administered in a discriminatory manner. It has not been used to disfranchise any class of citizens. We conclude that § 24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters.

The equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment are not the only standards by which state legislation governing the franchise must be measured. State laws affecting the right of suffrage must not contravene "* * * any restriction that Congress, acting pursuant to its constitutional powers, has imposed." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966); Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1731, 16 L.Ed.2d 828 (1966). The plaintiffs urge that requiring the name of the write-in candidate to be inserted in the voter's own handwriting violates the Voting Rights Act of 1965 (42 U.S.C. § 1973 et seq.). The constitutionality of pertinent sections of the Act is not in dispute. Cf. State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

Virginia is subject to the Act, 42 U.S.C. § 1973b(b). Until the state is removed from the Act's provisions, all tests or devices for determining eligibility to vote are suspended. 42 U.S.C. § 1973b(a).

The plaintiffs rely on these sections of the Act:

42 U.S.C. § 1973[1] (a):

> "* * * no citizen shall be denied the right to vote in any Federal, State, or local election because of his

failure to comply with any test or device in any State * * * ."

42 U.S.C. § 1973b(c):

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C.A. § 1973i(a):

"No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote."

Section 24-251, Code of Virginia 1950, authorizes a judge of election, upon request, to assist a physically handicapped voter prepare his ballot, and allows a blind voter to be aided by a person of his choice. The assistants are enjoined to secrecy. For any corrupt violation of their duties, they may be punished by confinement in jail for not less than one nor more than twelve months. No provision was made for helping an illiterate person because under Virginia law all voters had to demonstrate ability to read and write.

After the enactment of the Voting Rights Act of 1965, Virginia directed its registrars to help illiterate persons

register. The Board of Elections recognized that illiterates might need assistance with their ballots. For this reason, it instructed all judges of election:

> "On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.
>
> These instructions also apply to precincts in which voting machines are used."

The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state.

The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. § 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. Under present Virginia statutes and regulations of the

Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled.

Judgment will be entered for the defendants.

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 5041

RICHARD ALLEN, LENA W. DUNN, WASHINGTON MOORE, MCKINLEY DUNN, NORA TYLER, JAMES GILBERT TYLER, FANNIE M. BROWN, PATRICK H. BROWN and JAMES DONIKENS,

Plaintiffs,

v.

STATE BOARD OF ELECTIONS, MARK GRIZZARD, FOREST LANKFORD, BENJAMIN GRIFFIN, ROBERT E. GARNETT, J. S. LIPSCOMB, THOMAS BROWN and PAUL BELL,

Defendants.

For reasons stated in the opinion of the court this day filed;

It is ADJUDGED AND ORDERED that the prayer of the plaintiffs' complaint is denied, the complaint is dismissed, and the action is stricken from the docket with costs taxed against the plaintiffs.

May 2, 1967

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ HARRISON WINTER
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States District Judge